(2)

No. 89-1569

In the Supreme Court of the United States

OCTOBER TERM, 1989

SOLID WASTE SERVICES, INC., ET AL., PETITIONERS

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly held that petitioners waived their right to a jury trial in an action by the Secretary seeking injunctive relief under Section 17 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 217, and liquidated damages under Section 16(c) of the Act, 29 U.S.C. 216(c).

2. Whether the district court properly awarded back wages under the FLSA to nontestifying employees based on the representative testimony of other employees concerning hours worked.

3. Whether the district court properly exercised its discretion in allowing the Secretary to amend her complaint after trial to assert back wage claims for newly discovered employees, where petitioners had previously failed to disclose the identity of those employees, notwithstanding a timely request by the Secretary for such disclosure.

PARTIES TO THE PROCEEDING

Petitioners erroneously list Ann McLaughlin, the former Secretary of Labor, as respondent in this case. Elizabeth Dole, the current Secretary, was the plaintiff in the district court and appellee in the court of appeals. She is the respondent in this case. Joseph Mascaro, a defendant in the district court, Pet. App. 5a, was not a party in the court of appeals and is not a party in this Court.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unpublished, but the decision is noted at 897 F.2d 521 (Table). The opinion of the district court (Pet. App. 14a-102a) is reported at 733 F. Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1990. A petition for rehearing was denied on February 26, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on April 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are four interrelated corporations and two individuals, Michael and Pasquale (Pat) Mascaro, who (together with Joseph Mascaro) at all relevant times owned and controlled the corporations. Pet. App. 19a-20a. Under Section 3(r) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(r), both corporate and individual petitioners are one "enterprise." Pet. App. 74a-75a, 97a. As "employer[s]" under Section 3(d) of the FLSA, 29 U.S.C. 203(d), they are jointly and severally liable for violations of the Act. Pet. App. 76a, 97a.

Petitioners are engaged in the solid waste disposal industry. Pet. App. 18a, 19a. Between January 1985 and February 1989, petitioners employed over 300 individuals in three "divisions" and under at least 25 separate payroll classifications. *Ibid.*[1] In the JPM or Mascaro division, certain truck drivers (Classifications 200, 201, 202) serviced routes within various Pennsylvania municipalities. *Id.* at 24a-26a. They brought their loads to a transfer station in Souderton, Pennsylvania, where certain yard laborers (Classification 301) assisted in transferring the loads to tractor-trailers. See *id.* at 33a-34a. Tractor-trailer drivers (Classification 203) then took the loads to a landfill. *Id.* at 28a-29a, 50a. The Hoch Division contained similar classifications of truck drivers and laborers, see *id.* at 37a-38a, but also a separate classification (Classification 306) for drivers in the "Northern Division." *Id.* at 40a; Pet. 5. The Lackawanna Transport Division included two groups of tractor-trailer drivers (Classifications 103, 203) who drove

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[1] The three divisions are J.P. Mascaro & Sons (Mascaro or JPM), Hoch Sanitation, and Lackawanna Transport Company. Pet. App. 19a-20a. On January 1, 1987, the individual petitioners created Solid Waste Services, Inc. to be the parent corporation of these divisions, which continue to function as operating arms of the parent. *Id.* at 20a.

between three transfer stations (in Lower Merion, Abington, and South Philadelphia) and two landfills or another transfer facility in Dunmore, Morrisville, and Buckhorn, respectively. Pet. App. 43a-44a.

Despite previous investigations that uncovered minimum wage, overtime, child labor, and recordkeeping violations, and despite receiving Department of Labor advice on how to correct the violations (Pet. App. 58a-63a), petitioners paid some of their workers (*e.g.*, JPM 200 and Hoch 306 drivers) on an incorrectly calculated "day rate" basis. *Id.* at 24a, 40a.[2] They paid their tractor-trailer drivers (JPM 203, Lackawanna 103, 203) on a "per-trip" basis. *Id.* at 28a, 44a. They purportedly paid certain JPM route drivers and yard laborers (JPM 201, 202, 301) on an hourly basis, *id.* at 26a-27a, 33a-34a, but deducted a half hour per day for a lunch break—whether or not the employee actually took it. *Id.* at 22a. Petitioners' supervisors frequently punched out time cards of hourly workers before they finished working. *Id.* at 27a, 33a-34a. Petitioners kept no records of hours worked for their tractor-trailer drivers (*id.* at 28a, 43a), and either failed to record or inaccurately recorded hours worked for other employees. *Id.* at 24a, 27a, 33a-34a, 79a. Only once did petitioners produce what appeared to be legitimate employee time cards (for Hoch 306 drivers). *Id.* at 41a-42a. Those cards frequently showed more hours worked than did petitioners' payroll records; in other instances, it appeared that the same employee had spelled his last name differ-

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[2] The FLSA requires payment of a minimum wage, currently $3.80 an hour for most workers, Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 2, 103 Stat. 938 (to be codified at 29 U.S.C. 206(a)(1)), and overtime pay, at 1½ times the employee's regular rate, after a workweek longer than 40 hours. 29 U.S.C. 207(a)(1). The Act also requires employers to keep accurate records of wages and hours. 29 U.S.C. 211(c).

ently on different cards or that several employees had the same handwriting. *Ibid.*

2. The Secretary of Labor brought this action against petitioners for violations of the FLSA occurring from January 1985 through February 1989. Pet. App. 18a. In paragraph 1 of the complaint, she "invoke[d] [the district court's] equitable jurisdiction under section 17 of the Act [29 U.S.C. 217]," which authorizes district courts to restrain violations of the statute, and in her prayer for relief, she sought injunctive relief, including restitution of back wages, for minimum wage, overtime, child labor, and recordkeeping violations, and additionally an award of liquidated damages under Section 16(c) of the statute. Pet. App. 18a, 70a-71a.[3] The district court found jurisdiction under Sections 16 and 17 (*id.* at 97a) and awarded injunctive relief, back wages, and liquidated damages. *Id.* at 6a-7a.

a. The district court found that petitioners had violated the FLSA's recordkeeping requirements by failing to keep records or by keeping records that were inaccurate. Pet. App. 79a. In order to determine the extent to which employees were underpaid, it therefore applied this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Under *Mt. Clemens,* the court said, an employee who proves that his employer has kept inadequate records "need only introduce enough evidence to support a reasonable inference of hours worked" before the burden shifts to the employer to negate this inference. Pet. App. 81a. If the employer fails to do so, the court may award damages, even though they are only approximations, based on the employee's evidence. *Id.* at 82a.

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[3] Section 16(c), 29 U.S.C. 216(c), authorizes the Secretary to sue in "any court of competent jurisdiction" for back wages and "an equal amount as liquidated damages."

After carefully reviewing "several feet" of documentary evidence and hearing the testimony of 65 witnesses during an 11-day trial, the district court determined that it had a sufficient basis for estimating the hours that petitioners' employees had worked. Pet. App. 18a, 83a. The court found that JPM 200 drivers worked an average of 60 hours a week, based on employee testimony that work generally began at 5:00 or 6:00 a.m. and concluded between 5:00 p.m. and midnight without a lunch break. *Id.* at 24a-25a.[4] It rejected petitioners' rebuttal witness, a management employee, as not credible (*id.* at 25a), while at the same time ruling that the Secretary's wage calculations were not consistent with the evidence adduced at trial. *Id.* at 26a.

Similarly, the court credited testimony by JPM 201 and 202 drivers that petitioners did not pay them for ½ hour per day of work they did before and after their time cards were punched, and impermissibly deducted another ½ hour per day for lunch breaks that the employees did not take. Pet. App. 26a-27a. It rejected petitioners' rebuttal testimony as either irrelevant or consistent with the Secretary's evidence. *Id.* at 27a, 85a. The court awarded JPM laborers (Classification 301) compensation for a daily average of 3½ hours worked but unpaid at the Souderton transfer station, based in part on the "candid and credible" testimony of a laborer and in part on the corroborating testimony of truck drivers who used the yard during the relevant period. *Id.* at 33a-35a. Petitioners' rebuttal witnesses did not contradict this evidence, the court explained, because they testified about a later period. *Id.* at 34a.

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[4] The court found overwhelming credible evidence that petitioners actively discouraged employees from taking lunch breaks. Pet. App. 23a. The court also credited specific, nearly uniform testimony that employees could not take lunch breaks and still complete work requirements. *Id.* at 78a-79a.

On the basis of employee testimony that all Division employees worked approximately the same 9 to 11 hours on short days, up to 16 hours on long days, and 8 hours on Saturday, the district court found that the Hoch "Northern Division" (Classification 306) employees worked an average of 70 hours a week. Pet. App. 40a-41a, 43a. It rejected the time cards petitioners submitted in rebuttal as "at worst, blatant forgeries, visible to an untrained eye, or, at best, wholly unreliable." *Id.* at 42a. The court separately calculated the hours of the Lackawanna tractor-trailer drivers, based on testimony from these and other drivers about the average time required to drive between the relevant transfer stations and landfills, together with waiting time at these locations. *Id.* at 43a-48a.

b. After trial and pursuant to Fed. R. Civ. P. 15(b), the court granted the Secretary's motion to amend her complaint to add Lackawanna as a defendant and to include Lackawanna employees among those entitled to back wages. Pet. App. 65a-70a.[5] The court concluded that the amendment alleged the same violations as the original complaint, and was necessary because petitioners' failure to disclose information about Lackawanna had prevented the Secretary from learning of Lackawanna's existence until the first day of trial. *Id.* at 67a-68a. The court found that petitioners had adequate time to prepare a defense after the Secretary notified the parties of the intended amendment on the first day of trial, and it noted that although the court repeatedly had granted continuances on other occasions, petitioners had never sought a continuance to meet the Secretary's new evidence. *Id.* at 69a.

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[5] The district court applied the third sentence of Fed. R. Civ. P. 15(b), which directs courts freely to allow amendments to conform to the evidence when presentation of the merits would be served thereby and the objecting party fails to show prejudice.

c. The court also rejected petitioners' argument that it had no authority to award liquidated damages. The court recognized that such damages are available under Section 16(c) of the FLSA and that employers have a right to a jury trial under that Section. Pet. App. 71a.[6] It also recognized that the Secretary could be precluded from seeking liquidated damages if she failed to invoke the court's jurisdiction under Section 16(c), "whether or not [the Secretary's] complaint could be viewed as seeking liquidated damages under section 16." Pet. App. 72a (quoting *Brock* v. *Superior Care, Inc.*, 840 F.2d 1054, 1064 (2d Cir. 1988)). But in the present case, the court held, "the complaint plainly cites section 16(c) of the Act," and petitioners chose to defend against liquidated damages on the merits, "without noting their right to a jury trial" until the close of the Secretary's case. Pet. App. 72a-73a. The court observed that petitioners had failed to make a timely demand for a jury as of right under Fed. R. Civ. P. 38(a) and had failed to make a motion addressed to the court's discretion under Fed. R. Civ. P. 39(b). Pet. App. 73a-74a. Accordingly, the court found jurisdiction under both Sections 16 and 17 and awarded liquidated damages under Section 16(c) without a jury trial. Pet. App. 97a, 101a-102a.[7] The court of appeals, without opinion, affirmed. *Id.* at 3a-4a.

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[6] A party has a right to a jury trial under Section 16(c) on the issue of an employer's underlying liability for back wages, while the court determines the additional amount of liquidated damages under that Section. See 29 U.S.C. 260; *Brock* v. *Superior Care, Inc.*, 840 F.2d 1054, 1063 (2d Cir. 1988). Back wages under Section 17, on the other hand, are part of a restitutionary remedy available without a jury trial. See *Superior Care*, 840 F.2d at 1063.

[7] The district court concluded that liquidated damages were appropriate in this case, in light of petitioners' "flagrant disregard" for the FLSA's recordkeeping requirements and other evidence "which hints at an intent to violate the Act." Pet. App. 94a. The petition does not dispute that finding.

ARGUMENT

The court of appeals' judgment order, which affirmed a detailed and factbound district court decision, is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In awarding liquidated damages under Section 16(c) without a jury trial (see note 6, *supra*), the district court correctly applied the well established principle that a party must demand a jury trial in a timely manner, or the right will be waived. Fed. R. Civ. P. 38(d); *United States* v. *Moore*, 340 U.S. 616, 621 (1951). While this demand must be made within ten days of service of the last pleading directed to the issue on which a jury trial is available (Fed. R. Civ. P. 38(b)), a district court has discretion, upon motion, to order a jury trial at a later point. Fed. R. Civ. P. 39(b). In the present case, no such motion was made. Rather, as the district court noted (Pet. App. 72a-73a), petitioners did not raise the jury trial issue until their motion for a directed verdict at the close of the Secretary's evidence.

Thus, the district court correctly concluded that petitioners had waived any right to a jury with regard to the Secretary's claim for liquidated damages. Petitioners plainly knew before trial that liquidated damages were at issue; the Secretary had requested such relief in her complaint, and petitioners' pretrial brief had asserted a substantive defense to liquidated damages (but not a demand for trial by jury). Pet. App. 72a-73a. And petitioners were on notice that a jury trial might be available to them upon the issuance, a year before trial in this case, of the decision in *Superior Care*—the case on which they principally rely. See 840 F.2d at 1063-1064; Pet. App. 18a n.1; see also *McLaughlin* v. *Owens Plastering Co.*, 841 F.2d 299 (9th Cir. 1988).

Petitioners attempt to avoid the district court's waiver ruling by arguing that the court impermissibly awarded Section 16(c) liquidated damages as an incident to an equitable action under Section 17. Pet. 7-9. But the district court found jurisdiction proper under *both* Sections 16 and 17 (Pet. App. 97a), thus correcting any defective allegation of jurisdiction contained in the Secretary's pleadings. See 28 U.S.C. 1653; *Schlesinger* v. *Councilman*, 420 U.S. 738, 742 n.5, 744 n.9 (1975); see also Fed. R. Civ. P. 15(b). Having found jurisdiction under both of these sections, the court had the authority to award liquidated damages under Section 16(c). See Pet. App. 97a.[8]

Petitioners also contend that they did not waive their right to a jury trial because they "assumed that no jury trial could be had" on the Section 17 issues. Pet. 11 (citing *Superior Care*, 840 F.2d at 1064). As the district court recognized (Pet. App. 72a), however, the complaint in this case, unlike the complaint in *Superior Care*, specifically invoked Section 16(c). Additionally, unlike the employer in *Superior Care*, petitioners failed to ask the district court before trial to exclude any evidence pertaining to liquidated damages. Pet. App. 72a.

Finally, petitioners assert (Pet. 7, 13) that the court of appeals' decision is in conflict with the decisions of other courts of appeals. The cases petitioners cite, however, are easily distinguishable. For example, in *Superior Care*, the Second Circuit held that a district court could not award liquidated damages in a Section 17 action. The court did

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[8] Petitioners erroneously assert (Pet. 9) that once a trial court enjoins the withholding of back wages under Section 17 "it lacks the *power* to award liquidated damages." In fact, the court lacks such power only if it acts *solely* under Section 17. It certainly has the power to act under both Sections 16(c) and 17 and to award relief under both sections. See *Owens Plastering*, 841 F.2d at 301; *Superior Care*, 840 F.2d at 1064.

not decide whether a district court, as in this case, could assert jurisdiction and award relief under both Sections 16(c) and 17 without a jury trial, when the employer had notice of the provisions on which the Secretary was basing her claims, and yet the employer did not timely request a jury trial. And none of the other cases cited by petitioners (Pet. 7-12) held that a district court lacks authority to find a waiver of jury trial rights, or is precluded from awarding complete relief without a jury trial under Sections 16(c) and 17. See, *e.g.*, *EEOC* v. *Gilbarco, Inc.*, 615 F.2d 985, 990-991 (4th Cir. 1980) (affirming a denial of liquidated damages after accepting the Secretary's view that, despite a request for liquidated damages, the Secretary had brought the action only under Section 17); *Donovan* v. *Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982) (reversing denial of back wages under Section 17 and stating in dicta that courts cannot award liquidated damages under that Section).

2. Petitioners' challenge (Pet. 13-19) to the district court's application of *Mt. Clemens* is also meritless. The district court reasonably calculated the extent of petitioners' wage violations – by carefully considering representative employee testimony that petitioners failed credibly to rebut.

In *Mt. Clemens,* this Court held that if an employer has failed to keep proper records of wages and hours as required by law, an employee seeking to prove a violation of the FLSA need only "prove[ ] that he has in fact performed work for which he was improperly compensated" and "produce[ ] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. Thereafter, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn

from the employee's evidence." *Id.* at 687-688. If the employer fails to meet that burden, damages may be awarded "even though the result be only approximate." *Id.* at 688. That allocation of the burden of proof "proper[ly] and fair[ly]" avoids penalizing employees by "plac[ing] a premium on an employer's failure to keep proper records in conformity with his statutory duty." *Id.* at 687.

In applying *Mt. Clemens,* the lower courts have uniformly held that the Secretary may offer representative testimony on behalf of an entire class of employees. See, *e.g., McLaughlin* v. *Ho Fat Seto,* 850 F.2d 586 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *Brock* v. *Tony & Susan Alamo Found.,* 842 F.2d 1018, 1019-1020 (8th Cir. 1988); *Donovan* v. *Bel-Loc Diner, Inc.,* 780 F.2d 1113, 1116 (4th Cir. 1985).[9] The obvious pragmatic basis for permitting reliance on such representative testimony is to avoid burdening the trial courts with a parade of cumulative witnesses.[10] Moreover, there is no merit to petitioners' assertion (Pet. 15) that a court may accept representative testimony only if the employees – testifying and non-testifying – spend all of their working time together.[11]

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[9] Indeed, *Mt. Clemens* itself was a suit by a local union and seven of its members on behalf of some 300 similarly situated employees, only eight of whom testified at trial. See *Mt. Clemens Pottery Co.* v. *Anderson,* 149 F.2d 461, 461-462 (6th Cir. 1945), rev'd, 328 U.S. 680 (1946).

[10] See, *e.g., Donovan* v. *Burger King Corp.,* 672 F.2d 221, 225 (1st Cir. 1982) (significantly limiting the number of witnesses in an FLSA case was within the trial court's discretion under Fed. R. Evid. 403, because it prevents the "needless presentation of cumulative evidence"); *Bel-Loc Diner,* 780 F.2d at 1116 (awards to non-testifying employees based on testimony by a "small percentage" of employees are permissible so long as the testimony is "fairly representational").

[11] *Marshall* v. *R & M Erectors, Inc.,* 429 F. Supp. 771, 777 (D. Del. 1977), on which petitioners exclusively rely (Pet. 15), does not hold to the contrary. In that case, the district court held that when employees

Common sense shows that there are many ways to reach a "just and reasonable inference," *Mt. Clemens,* 328 U.S. at 687, of hours worked; indeed, imposing a requirement that all of the employees work together all the time would be impractical, because the nature of employees' work often requires them to work separately from one another. Finally, there is no requirement that testifying employees have "personal knowledge" of work performed by those who do not testify. *Beliz* v. *W.H. McLeod & Sons Packing Co.,* 765 F.2d 1317, 1331 (5th Cir. 1985), on which petitioners rely (Pet. 16-17), holds no such thing; indeed, the Fifth Circuit has long recognized that personal knowledge is *not* necessary. See *Brennan* v. *General Motors Acceptance Corp.,* 482 F.2d 825, 827 (1973) (affirming award of back pay to 26 employees who worked "long and irregular hours in the field * * * on their own," when only 15 of these employees testified).[12]

"leave a central location together at the beginning of a work day, work together during the day, and report back to the central location at the end of the day," representative testimony "can" make out a prima facie case that all the employees worked the same number of hours. The court did not hold, however, that representative testimony is inappropriate in other circumstances.

[12] Petitioner's remaining complaints about the amount of their back pay liability are simply factbound disagreements with the findings of the district court. For example, petitioners erroneously assert (Pet. 16) that the district court relied on the testimony of only one four-month laborer in awarding back wages to 90 JPM 301 laborers. In fact, the district court identified substantial corroboration for that testimony (Pet. App. 33a, 78a-79a), and it noted the absence of any rebuttal testimony for the relevant time periods (*id.* at 34a). In any event, petitioners "cannot be heard to complain" if the back wage award lacks "precision of measurement," *Mt. Clemens,* 328 U.S. at 688, because their own recordkeeping violations (which may have included "blatant forgeries," Pet. App. 42a) created the imprecision.

3. In allowing the Secretary to amend her complaint, the district court correctly applied Fed. R. Civ. P. 15(b), which allows such amendments "freely" to further presentation of the merits of an action, unless the party opposing the amendment shows prejudice to its defense on the merits.[13] The court concluded that the requested amendment—adding Lackawanna as a defendant, and including Lackawanna employees among those entitled to back wages—was well within the scope of the Secretary's original complaint. Pet. App. 66a-67a. Moreover, the court explained, the Secretary's failure to amend her complaint earlier was the result of petitioners' failure to disclose Lackawanna's existence—despite the Secretary's timely request for relevant documents during discovery. *Id.* at 67a-68a. In addition, the court found no prejudice to petitioners, noting that the claims for the additional employees were identical to those already at issue, and that petitioners had sufficient time to prepare a defense. *Id.* at 69a-70a. Under those circumstances, the court acted well within its discretion in allowing the amendment.

Petitioners contend, however, that the Secretary's amendment was governed not by Rule 15(b), but rather by Rule 16(e), which allows modification of pretrial orders "only to prevent manifest injustice." Pet. 19-21. Petitioners did not present that contention to the district court and they have therefore waived it. In any event, petitioners have not shown that Rule 16(e), if applicable, would foreclose the amendment in this case. Because the district court deemed petitioners' failure to disclose information about Lackawanna "perilously close to bad faith con-

[13] Although the district court granted the motion after trial, it noted that the Secretary had "made clear her intent to include Lackawanna as a defendant on the first day of trial." Pet. App. 69a. See also *id.* at 65a.

duct," Pet. App. 68a n.13, there is little question that the amendment would have satisfied even the "manifest injustice" standard under Rule 16(e). See *Hodgson* v. *Colonnades, Inc.*, 472 F.2d 42 (5th Cir. 1973) (finding an abuse of discretion in *refusing* to allow an amendment adding employees to an FLSA complaint seeking back wages).[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] Petitioner's reliance on *Ford* v. *Sharp*, 758 F.2d 1018 (5th Cir. 1985), is misplaced. There, unlike here, the district court disallowed an amendment to an FLSA complaint because it found that the Secretary had the relevant records two years before trial and that the employer had no chance to prepare a defense. *Id.* at 1025.

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